



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA AT NAIROBI
CIVIL APPEAL 297 OF 2003

MUMIAS SUGAR COMPANY LTD APPELLANTS

AND

FREIGHT FORWARDERS (K) LTD RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Mr. Justice Hayanga) dated 14th October, 2002

in

H.C.C.C. NO. 109 OF 2000)

JUDGMENT OF THE COURT

This is a first appeal from the judgment of the superior court (*Hayanga J as he then was*) delivered in Mombasa on 14th October 2003.

The case arose out of negotiations which took place between Freight Forwarders (K) Ltd., the plaintiff in the superior court who is the respondent in this appeal, and Mumias Sugar Company Ltd. which was the defendant in the superior court and is the appellant in the appeal.

The respondent was the lessee of Goods Shed No.5 (hereinafter "*the goods shed*") in Nairobi which it wished to sub lease to a suitable tenant. The appellant needed storage space in Nairobi and expressed an interest in leasing the goods shed from the respondent.

Negotiations took place as to the rent and as to the precise terms of the proposed sub lease. These negotiations took place during the period from 7th May 1999 to 26th May 1999.

It was the respondent's case in the superior court that the negotiations crystallized into a binding contract to sub lease the goods shed for 5 years and 1 month from 1st June 1999 at an annual rent of Shs.10,173,600 for the first 2 years and Shs.11,304,000 for next 3 years and 1 month.

The superior court found in the respondent's favour as to the existence of the alleged binding contract and granted prayer 1 in the Plaint giving judgment for the respondent plaintiff for Shs.3,461,200.

This was made up of the following three items:-

"Shs.70,000 being pleaded as "all costs in respect of the preparation of the Sub lease including advocates costs, stamp duty and registration charges.

Shs.2,543,400 being arrears of rent for the months of June, July and August 1999 due quarterly in advance.

Shs. 847,800 as security for payment of monies which may from time to time become owing."

However, the superior court declined to grant the prayer for specific performance of the sub lease.

The appellant is aggrieved by this judgment and maintains that no binding contract or sub lease exists with the result that the appellant was within its rights when it decided not to proceed with the sub lease which decision was communicated to the respondent by letter dated 30th June 1999. The reason for the decision not to sub lease the premises was stated to be that the appellant had discovered, during a visit on 8th June 1999 to the goods shed by its sales and marketing manager, that there was no electricity, no water facilities and no WC on the premises

all of which were claimed to be essential facilities for any operational goods shed.

There was no evidence either way as to whether the premises had ever been inspected prior to 8th June 1999. But it would be surprising if the appellant had entered into detailed negotiations before looking at the premises.

An attempt was made at a meeting on 11th June 1999 to resolve the issue but nothing came of this and the respondent told the appellant that the appellant would have to take the goods shed as it was. This was not acceptable to the appellant who then returned the keys and stated that it was left with no choice but to withdraw its offer to sub lease the goods shed. The appellant claimed that the delivery of the keys by the respondent to the appellant was purely for the purpose of enabling the appellant to inspect the premises and did not amount to the taking of possession by the appellant as asserted by the respondent.

It is not necessary for us to recite the contents of all the correspondence comprising the negotiations between the appellant and the advocate acting for the respondent. It is clear from that correspondence, which began with the sending of a draft sub lease by the respondent to the appellant, that it ended with final agreement by the two parties as to the wording of all the clauses in the proposed sub lease (many of which had been amended during the process of negotiation).

A letter dated 24th May 1999 was the final letter from the appellant proposing changes to the wording of the sub lease. This correspondence as to the precise wording of the sub lease terminated with the letter from the respondent's advocate to the appellant dated 26th May 1999. This read:-

“I refer to your faxed letter dated 24th May 1999 and write to inform you that your comments stated therein have been accepted by my client and the same have been incorporated in the above mentioned sub lease.

Please confirm by return that I may now proceed to prepare the final engrossments of the Sub-lease and send the same to yourselves for execution.”

There was no reply from the appellant to the letter dated 26th May 1999. On 28th May 1999 the respondent's advocate wrote to the appellant sending three engrossments of the sub lease for execution by the appellant and requesting a cheque for Shs.3,391,200 being quarterly rent in advance plus the security referred to above and another cheque for stamp duty, disbursements, legal fees and VAT.

We have carefully studied the correspondence between the parties adduced in evidence and have come to the conclusion that it is sufficient to prove the existence of a binding contract between the parties to enter into a sub lease in the terms of the draft sub lease, amended as agreed in the correspondence.

It was pleaded by the appellant in *paragraph 3(b)* of the Defence that the appellant/defendant did not accept the lease or sub lease on the terms proposed by the plaintiff. We are satisfied that the letter dated 24th May 1999 constituted a counter offer by the appellant to accept the sub lease amended in accordance with the stipulations in that letter and we are further satisfied that the letter dated 26th May 1999 from the respondent to the appellant constituted an acceptance of that counter offer with the result that a contract to execute the sub lease binding on the appellant and the respondent came into existence. We have noticed that *Exhibit 9* (a draft of the proposed sub lease) the date of which is not clear from the record does not include the amendment to *Clause 5 (e)* agreed to by both parties in the exchange of letters cited above and the appellant would have been able to insist on this being reflected in the engrossed sub lease.

Furthermore, the appellant made his submissions in the superior court in writing and nowhere in those submissions did he identify any particular clause which was included in *Exhibit 9* being the final version of the sublease as to which the appellant still objected.

At this stage it is necessary to examine the manner in which the case was pleaded by the parties. The relevant paragraphs of the ***Plaint*** for the present purposes after the description of the parties read as follows :-

“3. By an agreement between the plaintiff and the defendant, the plaintiffs subleased to the defendant a goods shed No. 5 near the Nairobi Railway (“the leased premises) for a term of five years and one month from June 1, 1999 under the terms and conditions as set out in the Sub-lease.

4. Pursuant to the sub-lease the defendant agreed to pay to the plaintiff a deposit equivalent to one month's rent amounting to K.Shs 847, 800 which amount was to remain with the plaintiffs as security for payment of moneys which may from time to time be owing from the defendant to the plaintiff for the due performance and observance of the covenants and conditions in the sub-lease.

5. The plaintiffs avers and contends that the defendant has failed to pay rent of K.Shs. 2,543,400 for the months of June, July and August, 1999 which is the rent to be paid quarterly in advance as provided in the Sub-lease.

6. It was further agreed and provided in the Sub-lease that the defendant was to be responsible for all costs in respect of the preparation of the Sub-lease including advocates costs, stamp duty and registration charges, advocates costs in this transaction amount to K Shs.70,000.

7. The Plaintiff's claim against the Defendant is for the sum of K.Shs.3,461,200 being the amount due and owing by the Defendant to the Plaintiff in respect of outstanding rent, deposit and cost of preparing the Sub-lease.

8. Pursuant to the Sub-lease the Defendant took possession of the leased premises on 1st June 1999.

9. The Defendant in breach of the said Sub-lease has to date refused and/or neglected to execute the Sub-lease as agreed between the plaintiff and the defendant and further the Defendant in breach of the Sub-lease vacated the leased premises on 30th June 1999 after occupying it for a month.

10. By reason of the matters aforesaid the Plaintiff claims specific performance of the said Sub- lease.

11. In the alternative the Plaintiff claims general damages.

12. This Honourable Court has jurisdiction to try this case.

REASONS WHEREFORE the Plaintiff prays for judgement against the Defendant for:

(a) K.Shs. 3,461,200 as per paragraphs 4,5,6 and 7 hereinabove;

(b) Specific Performance of the Sub-lease as per paragraphs 8,9 and 10 hereinabove;

(c) In the alternative, General damages as per paragraph 11;

(d) Interest of (sic) of (a) and (c) at court rates until payment in full; and

e) Any other further relief this Honourable Court deems fit to grant.

Dated at Mombasa this 2nd day of March, 2000.

Amina H. Amarshi

ADVOCATE FOR THE PLAINTIFF”

It is clear from the above that the plaintiff’s pleaded case is that there was already a Sub-lease in existence. The plaintiff/respondent was not pleading that there was an agreement to enter into a sub lease which agreement entitled the plaintiff to specific performance of the defendant’s obligation to enter into a Sub-lease.

The defendant’s answer to this claim in its *Defence* was to plead as follows:-

“1. Save as hereinafter expressly admitted the defendant denies each and every allegation contained in the *Plaint* as though the same were set out and traversed seriatim.

2. The defendant admits the descriptive parts of paragraphs 1 and 2 of the *plaint* save that her address for service for the purposes hereof shall be care of E.K. Owinyi Advocates.....Kakamega.

3. The defendant avers that the *Plaint* does not disclose any or any reasonable cause of action against her (sic) and the plaintiff’s claim, if any, is misconceived in that

(a) There is no executed lease or sub lease between the plaintiff and the defendant.

(b) There is no lease or binding lease or sub-lease between the plaintiff and the defendant or transfer to the defendant in terms of Section 53A and Section 105 of the *Transfer of Property Act 1882* in that the defendant did not accept the lease or sub-lease on the terms proposed by the Plaintiff and the plaintiff is debarred from enforcing any rights against the defendant.

(c) The purported lease or sub-lease being a registrable instrument was not registered as required under Section 107 of the *Transfer of Property Act 1882* and is therefore of no legal consequence.

(d) The suit premises lacked or at the material time lacked water, electricity and other conveniences such as waste conveniences and are therefore untenable.

(e) The alleged lease or sub lease is unenforceable in view of the provisions of the *Law of Contract Amendment Act No 21 of 1990*.

4. Paragraphs 3,4,5,6 and 7 of the *Plaint* are not admitted and the defendant specifically denies that any or the alleged agreement was concluded between the plaintiff and the defendant or that the defendant agreed to pay one moth’s rent deposit in the sum of K.Shs. 847,800/- or that the defendant was obliged or failed to pay rent for June July and August, 1999 amounting to K.Shs. 2,543,400/= or costs for the preparation of any or the alleged sub-lease amounting to KShs 70,000/= or the sum of KShs. 3,461,200/= as alleged or at all and the plaintiff is put to strict proof thereof.

5. *The defendant denies that it took possession of the suit premises on 1st June,1999 as alleged or at all and the plaintiff is put to strict proof thereof.*
6. *The defendant admits that she (sic) did not execute the lease or the sub-lease as the terms and conditions thereof were not acceptable to her.*
7. *In the premises, the defendant denies that the plaintiff is entitled to specific performance of any or the alleged lease or sub-lease and the plaintiff is put to strict proof thereof.*
8. *It is the defendant's contention that general damages are not available to the plaintiff as the plaintiff's claim, if any, which is denied is premised on breach of contract.*
9. *Further it is the defendant's contention that this honourable Court lacks jurisdiction to entertain the plaintiff's claim as the defendant's registered office is at Mumias near Kakamega and the suit premises in Nairobi both places without the jurisdiction of this Honourable Court.*

WHEREFORE the defendant prays that the plaintiff's suit be dismissed with costs.

Dated at Mombasa this 8th day of April 2000.

E.K.Owinyi

Advocates for the Defendant"

In our view this pleading raises points of defence which are logically responsive to the Plaint as drafted.

If the Plaint had been drafted on the basis that the claim was for specific performance of a binding contract, contained in correspondence, to enter into a sub lease then the reference to **Sections 53A, 105 and 107** of the **Transfer of Property Act 1882** would not be relevant as those sections deal with the transfer or lease itself in contradistinction to a contract to enter into such a lease.

It is now necessary to consider the authorities and statute law cited by the parties in so far as they are relevant to the case as pleaded.

The appellant sought to rely on the **Law of Contract Act Cap 23** in its un-amended form since the amendments were not in force in June 1999 which then read as follows:-

"No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract---

(i) has in part performance of the contract taken possession of the property or any part thereof; or

(ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

The submission of learned counsel for the appellant (**Mr. J.M.N. Maende**) in this respect was that no one signed the sub lease. The respondent cannot blame the appellant's counsel for harping on the sub lease since it is the pleaded case of the respondent that there was a sub lease in existence rather than a mere contract to enter into a sub lease.

We consider that a contract to enter into a lease or sub lease contained in correspondence between the parties consisting of letters signed by authorised employees of companies being the intended lessor and lessee is not prevented from being the basis of a suit by **subsection (3)** of the **Law of Contract Act Cap 23**. Such correspondence is a sufficient memorandum. Therefore it is not necessary in such circumstances to rely upon the proviso to that subsection and it is not necessary to make a finding as to whether there was part performance arising from the appellant having possession of the keys to the premises allegedly for the purpose of inspection only.

Having found that there was a valid enforceable contract to enter into a sub lease but that there was no sub lease in existence as pleaded by the respondent we now need to consider what orders we should make.

Given the passage of time and the evidence from the respondent's witness in the superior court that the respondent has surrendered its lease back to its landlord, Kenya Railways, it is clearly not possible now to make any order for specific performance of the contract to enter into a sub lease.

The monetary awards by the superior court totalled Kshs.3,461,200 made up as follows:-

- i) One months' rent deposit - 847,800
- ii) Quarterly rent (June/July/August - 2,543,400
- iii) Advocate's costs - 70,000

3,461,200

The first amount was pleaded in *paragraph 4* of the Plaint to be one month's rent which amount was to remain with the Plaintiff as security for payment of monies which may from time to time be owing from the defendant to the Plaintiff as security for the due performance and observance of the sublease. Since the sub lease never came into existence and there was no order for specific performance by the superior court and, since no particulars have been given of any amount covered by the security we do not consider that there is any basis upon which the security can now be properly claimed by the respondent. The claim for the security amount of Shs 847,800 is dismissed.

The second amount of Shs.2,543,400 claimed by the respondent was an advance payment of three months rent totaling that sum which the appellant had agreed to pay on 1st June 1999 as one of the terms of the contract to enter into the sub lease.

The claim for quarterly rent raises the issue as to whether or not payment of rent agreed as part of a contract to enter into a sub lease can be enforced despite the sub lease not having come into existence by execution by the parties or resulting from an order for specific performance followed by registration.

In the case of **Rogan –Kamper v. Lord Grosvenor (No 2) 1977 KLR 123** this Court (*Wambuzi P., Mustafa JA and Platt J as he then was*) was dealing with a situation in which the landlord's plaint averred that: (a) there was an agreement in writing dated 29th September 1976 by which the landlord agreed to grant the tenant a lease for five years and one month; (b) that after entering into possession, the tenant despite being tendered a draft lease, failed to approve or execute it; (c) that it was an express term of the draft lease that the landlord was at liberty to terminate the tenancy and re-enter into possession if rent or any part thereof was in arrears for fourteen days; and (d) since April 1970 the tenant had failed to pay the agreed rent and that "by virtue of the aforesaid breach of the express or implied term of the lease" the landlord gave notice to quit. Mustafa JA commented that "It seems that the landlord was claiming possession and arrears of rent on the basis of the draft lease which neither party had executed."

Mustafa JA then quoted a passage from Law V-P in the earlier appeal (No 1) arising from the same case reading as follows:-

"The use of the word "lease" [in the plaint].....seems to me unfortunate and confusing. There never was an executed lease, dated 29th September 1969...The trial judge, unfortunately fell into the same error, and held as follows: 'In any case, this is a case of an unregistered lease.' With respect, it is not. There never was a lease in existence, capable of registration.....The question arises, whether such an agreement is valid and enforceable by either party although not registered....This contract could have been ordered to be specifically performed by either party.The tenant must be deemed to hold under the same terms as if a lease had been granted, and he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted: See the judgment of Jessel MR in Walsh v. Lonsdale (1882) 21 Ch D 9"

The above comments as to the use of the word "lease" seem to us equally applicable to the use of the words "sub-lease" in the Plaint in the case now before us and we reiterate that we are not dealing with a case in which an executed sub lease exists: we are dealing with a case in which we have found that a binding contract to enter into a lease does exist of which contract the superior court declined to order specific performance.

There was no cross appeal by the respondent against the refusal of the superior court to order specific performance. This is not surprising since by the time the appeal was filed, and indeed by the time the case came up for hearing in the superior court, the respondent had no wish, or indeed power, to force the appellant into performance given that by that time it appears from the appellant's evidence that the respondent had surrendered its lease back to its landlord the Kenya Railways.

What effect if any does this have on the respondent's right to enforce the provisions for payment of the three months rent in advance amounting to Shs.2,543,400 ?

In **Rogan –Kamper v. Lord Grosvenor (No 2) 1977 KLR 123** at page 128 Mustafa JA quotes the following passage from the decision of the Privy Council in the Indian case of **Ariff v. Jadinath Majumdar (1930) 58 Cal 1235** :

"Their Lordships themselves are in agreement with the High Court in the view that Walsh v Lonsdale has no application to this case, owing to the fact that the respondent's right to enforce the contract had been barred long before the commencement of the present suit. The respondent was not in a position to obtain specific performance of the agreement for a lease from the same court and at the same time as the relief claimed in this section. Had he been so entitled the position would be very different, for then the respondent could claim to have executed in his favour by the appellant an instrument in writing which he could have duly registered, the appellant's ejectment action being stayed in the meantime. In these circumstances the respondent would obtain complete protection, but consistent with and not in violation of the provisions of the Indian statute."

In the case before us there was no question of the right to seek an order for specific performance of the contract to enter into the sub lease being time barred but, as we have seen, an order for specific performance had become impossible to grant by the time the witness for the respondent gave his evidence before the superior court.

Platt J in Rogan –Kamper v. Lord Grosvenor (No 2) 1977 KLR 123 at page 135 expressed his conclusion in the following terms :

***“The agreement, though executory as far as the intended lease is concerned, may be used in proper circumstances to support a suit for specific performance; and according to Souza Figueiredo’s case the covenant to pay rent contained in the agreement may be looked at as a contractual stipulation. But it seems to me that the other terms of the agreement relating to the future lease can only be relied upon in connection with specific performance. That is the extent of the contract operating inter partes.*”**

The difficulty which arose in this case stems originally from the terms of the plaint.”

Platt J., while being of the view that the covenant to pay rent in a contract to enter into a lease may be looked at, does not expressly state that it can be enforced.

In the case before us the first three month’s rent in advance was stipulated in the contract to enter into the sub lease to be due for payment on 1st June 1999. On that date the contract was capable of being specifically performed by both parties if so ordered.

We consider, and so find, that the relevant date on which the contract must be proved to be capable of specific performance in order to satisfy the conditions set by *Ariff v. Jadinath Majumdar (supra)* is the date when the suit claiming the rent is filed and not the date upon which the amount claimed under a covenant in the contract to pay rent first became due (which in this case was 1st June 1999).

Whether the contract was capable of being specifically performed on the date of filing of the plaint namely the 2nd March 2000 is not known since there was no evidence adduced by the respondent as to when the respondent’s lease was surrendered back to its landlord the Kenya Railways. We consider that the burden of proof as to this fact was upon the respondent as was the burden of proving that the contract was capable of specific performance at the date of filing the plaint. The respondent failed to discharge that burden.

The result is that the superior court was wrong in ordering the appellant to pay the sum of Shs.2,543,400 to the respondent.

The third amount of KShs 70,000 was pleaded to be the costs of the preparation of the sub-lease including advocates cost, stamp duty and registration charges. While the terms of the sub-lease were negotiated and agreed and engrossed the sub lease was never finally signed, registered or stamped. We find the sum of Kshs 50,000 to be reasonable and would allow the appeal to that extent.

In the result that the appeal is allowed to the extent stated above and the judgment of the superior court is hereby set aside. There will be substituted for that judgment, judgment for the plaintiff for the sum of Shs. 50,000 together with costs with interest thereon at Court rates from the date of the lower court’s judgment. We further order the respondent to pay ¾ of the appellant’s costs of the appeal and in the superior court.

Dated and delivered at Nairobi this 18th day of March, 2005.

E. O. O’KUBASU

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JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

W. S. DEVERELL

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR